



STATE OF WASHINGTON
ENVIRONMENTAL AND LAND USE HEARINGS OFFICE

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August 15, 2018

Sent by Email and US Mail

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Re: **PCHB NO. 17-090**
MILLENNIUM BULK TERMINALS-LONGVIEW, LLC v. STATE OF
WASHINGTON, DEPARTMENT OF ECOLOGY
WASHINGTON ENVIRONMENTAL COUNCIL, CLIMATE SOLUTIONS,
FRIENDS OF THE COLUMBIA GORGE, SIERRA CLUB, and COLUMBIA
RIVERKEEPER, Intervenors

Dear Parties:

Enclosed is the Pollution Control Hearings Board's Order on Summary Judgment in this matter.

This is a FINAL ORDER for purposes of appeal to Superior Court within 30 days. See Administrative Procedures Act (RCW 34.05.542) and RCW 43.21B.180.

You are being given the following notice as required by RCW 34.05.461(3): Any party may file a petition for reconsideration with the Board. A petition for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final decision. WAC 371-08-550.



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If you have any questions, please feel free to contact the staff at the Environmental and Land Use Hearings Office at 360-664-9160.

Sincerely,



Joan M. Marchioro, Presiding

JMM/le/P17-090

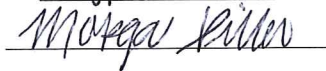
Encl.

CERTIFICATION

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid or via delivery through State Consolidated Mail Services to the attorneys of record herein.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED 8/15/18, at Tumwater, WA.



1 **POLLUTION CONTROL HEARINGS BOARD**
2 **STATE OF WASHINGTON**

3 MILLENNIUM BULK TERMINALS-
4 LONGVIEW, LLC,

5 Appellant,

6 v.

7 STATE OF WASHINGTON,
8 DEPARTMENT OF ECOLOGY,

9 Respondent,

10 WASHINGTON ENVIRONMENTAL
11 COUNCIL, CLIMATE SOLUTIONS,
12 FRIENDS OF THE COLUMBIA GORGE,
13 SIERRA CLUB, and COLUMBIA
14 RIVERKEEPER,

15 Intervenor-Respondents.

PCHB No. 17-090

ORDER ON SUMMARY JUDGMENT

16 **INTRODUCTION**

17 Millennium Bulk Terminals-Longview, LLC (Millennium) filed a Notice of Appeal
18 seeking review of the Department of Ecology's (Ecology) denial of a Clean Water Act (CWA)
19 Section 401 Certification (401 Certification) for Millennium's proposed coal export terminal.
20 Washington Environmental Council, Climate Solutions, Friends of the Columbia Gorge, Sierra
21 Club and Columbia Riverkeeper (WEC) were granted intervention as respondents. Millennium,
Ecology, and WEC filed separate motions for summary judgment. BNSF Railway Company
was granted leave to file an *amicus curiae* brief in support of Millennium.

1 The Board considering this matter was comprised of Board Chair Joan M. Marchioro,
2 Presiding, and Members Kay M. Brown and Neil L. Wise. Attorneys Beth S. Ginsberg and
3 Jason T. Morgan represented Millennium. Senior Counsel Thomas J. Young and Assistant
4 Attorney General Sonia A. Wolfman represented Ecology. Kristen L. Boyles, Marisa C. Ordonia
5 and Jan E. Hasselman represented Intervenor-Respondents WEC.

6 In rendering its decision, the Board considered the following submittals:

- 7 1. Millennium's Motion for Summary Judgment on Issues 3-10 and 12;
- 8 2. Declaration of Beth Ginsberg In Support of Millennium's Motion for Summary
9 Judgment, with Exhibits A-C;
- 10 3. Respondent Department of Ecology's Response to Millennium's Motion for
11 Summary Judgment on Issues 3-10 and 12;
- 12 4. State of Washington, Department of Ecology's Motion for Partial Summary
13 Judgment on Legal Issue 2;
- 14 5. Declaration of Thomas J. Young In Support of Ecology's Response to
15 Millennium's Motion for Summary Judgment on Issues 3-10 and 12 and In
16 Support of Ecology's Motion for Summary Judgment on Issue 2, with Exhibits A-
17 G;
- 18 6. Declaration of Loree' Randall In Support of Ecology's Response to Millennium's
19 Motion for Summary Judgment on Issues 3-10 and 12 and In Support of
20 Ecology's Motion for Summary Judgment on Issue 2, with Exhibits A-E;
- 21 7. Washington Environmental Council *et al.* Opposition to Millennium Motion for
Summary Judgment on Issues 3-10 and 12 and Cross-Motion for Summary
Judgment on All Remaining Issues;
8. Declaration of Marisa Ordonia In Support of Washington Environmental Council
et al. Opposition to Millennium Motion for Summary Judgment on Issues 3-10
and 12 and Cross-Motion for Summary Judgment on All Remaining Issues, with
Exhibits A-G;

- 1 9. Millennium's Reply In Support of Its Motion for Summary Judgment on Issues 3-
2 10 and 12;
- 3 10. Second Declaration of Beth Ginsberg In Support of Millennium's Motion for
4 11. Summary Judgment on Issues 3-10 and 12, with Exhibits A-B;
- 5 11. Millennium Bulk Terminals-Longview's Opposition to Ecology's Motion for
6 12. Summary Judgment on Issues No. 2;
- 7 12. Declaration of Kristin Gaines, with Exhibits A-D;
- 8 13. Declaration of Nicole LaFranchise;
- 9 14. Declaration of Glenn Grette;
- 10 15. Declaration of Jason T. Morgan in Opposition to Department of Ecology's
11 16. Motion for Summary Judgment on Issue No. 2, with Exhibits A-F;
- 12 16. BNSF Railway Company's *Amicus Curiae* Brief In Support of Millennium Bulk
13 17. Terminals Longview, LLC's Motion for Summary Judgment and In Opposition to
14 18. Department of Ecology's Motion for Partial Summary Judgment;
- 15 17. Respondent Department of Ecology's Response to BNSF Railway Company's
16 18. *Amicus Curiae* Brief;
- 17 18. State of Washington, Department of Ecology's Reply In Support of Motion for
18 19. Partial Summary Judgment on Legal Issue 2;
- 19 19. Declaration of Sally Toteff In Support of Department of Ecology's Reply to
20 20. Millennium's Response to Ecology's Motion for Summary Judgment on Issue 2;
- 21 20. Second Declaration of Loree' Randall In Support of Ecology's Motion for partial
22 21. Summary Judgment on Legal Issue 2, with Exhibit A;
21. Declaration of Rebecca Rothwell, with Exhibit A;
22. Declaration of James DeMay;
23. WEC *et al.* Reply In Support of Cross-Motion for Summary Judgment;

1 24. Millennium Bulk Terminals-Longview, LLC's Sur-Reply In Opposition to
2 Ecology's Motion for Summary Judgment on Issue 2; and

3 25. The Board's file in this matter.

4 The parties' motions address the following legal issues from the Prehearing Order
5 previously entered by the Board:¹

- 6 2. Whether there is reasonable assurance that the construction and operation of
7 Millennium's proposed project will meet applicable water quality standards
8 pursuant to 40 C.F.R. §121.2(a)?
- 9 3. Whether Ecology's Denial is *ultra vires* because it is based on concerns that are
10 not related to water quality?
- 11 4. Whether Ecology's Denial is arbitrary, capricious, contrary to law and
12 unsupported by substantial evidence?
- 13 5. Whether Ecology's application of RCW 43.21C.060 to support the Denial is
14 overbroad?
- 15 6. Whether Ecology's application of RCW 43.21C.060 to support the denial is
16 preempted by 33 U.S.C. §1341?
- 17 7. Whether Ecology's was precluded from denying the certification based on RCW
18 43.21C.060 when water quality certifications are exempt from SEPA pursuant to
19 WAC 197-11-800(9)?
- 20 8. Whether Ecology waived its certification rights under 33 U.S.C. §1341?
- 21 9. Did Ecology have substantive authority under the State Environmental Policy Act
(SEPA), RCW 43.21C.060, to deny the section 401 certification with prejudice,
regardless of whether such authority existed under section 401?

¹ The Board previously granted summary judgment on Issue 1, concluding that it had jurisdiction to hear the appeal of the denial of a Clean Water Act Section 401 water quality certification under RCW 43.21B.110. *Millennium Bulk Terminals-Longview, LLC v. Ecology*, PCHB No. 17-090 (Order Granting Motion for Partial Summary Judgment on Legal Issue 1, Feb. 27, 2018).

1 terminal would include two new docks (Docks 2 and 3) in the Columbia River, and shiploading
2 facilities on the two docks. Dredging would be required to provide access to and from the
3 Columbia River navigation channel (navigation channel) and for berthing at Docks 2 and 3.”

4 Young Decl., Ex. A at S-1.

5 Millennium intends to construct the Project in two stages. During Stage 1, Millennium
6 would construct the two docks, two stockpile pads, railcar unloading facilities, the operating rail
7 track and rail storage tracks, Project site area ground improvements, associated facilities and
8 infrastructure. The Project’s throughput capacity at the completion of Stage 1 would be 25
9 million metric tons of coal per year (MMTPY). Stage 2 facilities, construction of which would
10 begin at the completion of Stage 1, consist of one additional ship loader on Dock 3, two
11 additional stockpile pads, conveyors, and equipment necessary to increase throughput to 44
12 MMTPY. Young Decl., Ex. A at S-20-22.

13 The Project will impact more than 32 acres of wetlands and approximately six acres of
14 ditches. Millennium proposes to mitigate for these impacts through the construction of a wetland
15 mitigation site of approximately 100 acres. The Project will create new overwater coverage
16 totaling 4.83 acres, the impacts of which will be addressed through the construction of an off-
17 channel mitigation site. Ginsberg Decl., Ex. A at 3-4.

18 The Project is intended to operate 24 hours per day, seven days per week, and is designed
19 for a minimum 30-year period of operation. Young Decl., Ex. A at S-8. The Project also
20 requires the dredging of approximately 500,000 cubic yards of sediment from the Columbia
21 River in order to provide site access from the river’s navigation channel and berthing at Docks 2

1 and 3. *Id.*, Ex. A at 2-17. At full terminal operations, the Project would “bring approximately 8
2 loaded unit trains each day carrying coal to the project area, send out approximately 8 empty unit
3 trains each day from the project area, and load an average of 70 vessels per month or 840 vessels
4 per year, which would equal 1,680 vessel transits in the Columbia River annually.” *Id.*, Ex. A at
5 S-8.

6 Cowlitz County and Ecology served as co-lead agencies for environmental review of the
7 Project under the Washington State Environmental Policy Act (SEPA), ch. 43.21C RCW. On
8 September 9, 2013, Cowlitz County issued a revised Determination of Significance stating that
9 the Project was likely to result in significant adverse environmental impacts and that an
10 environmental impact statement (EIS) was required. Cowlitz County and Ecology elected to
11 prepare a joint SEPA EIS. Young Decl., Ex. A at S-2.

12 On April 28, 2017, Cowlitz County and Ecology issued the final EIS (FEIS) for the
13 Project. The FEIS identified unavoidable and significant adverse environmental impacts
14 associated with construction and operation of the Project, as well as proposed mitigation
15 measures. With respect to the significant adverse environmental impacts and mitigation, the
16 FEIS stated:

17 If the proposed mitigation measures were implemented, they would reduce but
18 not completely eliminate significant adverse environmental impacts resulting
19 from construction and operation of the [Project]. Unavoidable and significant
20 adverse environmental impacts could remain for nine environmental resource
areas: social and community resources; cultural resources; tribal resources; rail
transportation; rail safety; vehicle transportation; vessel transportation; noise
and vibration; and air quality.

21 Young Decl., Ex. A at S-41; *see also* S-41-44, S-46-60. The FEIS was not appealed.

1 In order to construct the project, Millennium must obtain a CWA Section 401 water
2 quality certification from Ecology. 33 U.S.C. §§ 1341. Millennium submitted a Joint Aquatic
3 Resources Permit Application requesting a Section 401 water quality certification from Ecology.
4 On September 26, 2017, Ecology issued Order # 15417 denying Millennium's request for a
5 Section 401 water quality certification with prejudice. Ecology denied the 401 Certification on
6 two bases: (1) the Project's significant, unavoidable adverse impacts identified in the FEIS
7 conflicted with Ecology's SEPA policies in WAC 173-802-110; and (2) Ecology did not have
8 reasonable assurance that the Project as proposed would meet applicable water quality standards
9 and other appropriate requirements of state law. Ginsberg Decl., Ex. A. Millennium timely
10 appealed Ecology's decision.

11 ANALYSIS

12 A. Summary Judgment Standard

13 Summary judgment is a procedure available to avoid unnecessary trials where there is no
14 genuine issue of material fact. *Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667,
15 675-76, 292 P.3d 128 (2012). The summary judgment procedure is designed to eliminate trial if
16 only questions of law remain for resolution, and neither party contests the facts relevant to a
17 legal determination. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d
18 443 (1990), *review denied*, 117 Wn.2d 1004 (1991).

19 The party moving for summary judgment must show there are no genuine issues of
20 material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton*
21 *Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a

1 summary judgment proceeding is one affecting the outcome under the governing law. *Eriks v.*
2 *Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). If the moving party satisfies its burden,
3 then the nonmoving party must present evidence demonstrating that material facts are in dispute.
4 *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). Bare
5 assertions concerning alleged genuine material issues do not constitute facts sufficient to defeat a
6 summary judgment motion. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140, 331 P.3d 40 (2014).
7 When determining whether an issue of material fact exists, all facts and inferences are construed
8 in favor of the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068
9 (2002). The Board will enter summary judgment for a non-moving party under appropriate
10 circumstances. *Impecoven v. Department of Revenue*, 120 Wn.2d 357, 365, 842 P.2d 470
11 (1992).

12 The parties contend that there are no material issues in dispute and this matter is
13 appropriate for summary judgment. The Board concurs.

14 **B. Ecology can use substantive SEPA to deny 401 certification (Issues 3, 4, 5, 6, 7, 9 and**
15 **10)**

16 Millennium challenges Ecology's use of substantive SEPA authority to deny the 401
17 Certification. Millennium asserts that, pursuant to WAC 197-11-800(9), its 401 Certification
18 request for the Project is categorically exempt from the requirements of SEPA. Millennium also
19 contends that Ecology's use of substantive SEPA authority to deny the 401 Certification
20 exceeded the scope of the agency's authority under Section 401 of the CWA.
21

1 Ecology and WEC disagree. Citing WAC 197-11-305(1)(b), they argue that because
2 segments of the Project are not SEPA exempt, the 401 Certification is likewise not exempt.
3 Ecology and WEC assert that because SEPA is supplementary to all other existing
4 authorizations, an agency can use its substantive SEPA authority to deny a permit even though
5 all criteria for the permit have otherwise been met. Finally, Ecology and WEC argue that no
6 provision of the CWA precludes Ecology's use of substantive SEPA authority when acting on a
7 401 certification request.

8 As discussed below, the Board agrees with Ecology and WEC. Under the facts of this
9 case, the 401 Certification is not categorically exempt from SEPA. Nor does Section 401 of the
10 CWA preclude Ecology's use of substantive SEPA in this instance. The Board concludes that
11 Ecology's use of substantive SEPA authority to deny Millennium's 401 Certification request was
12 not clearly erroneous. Therefore, the Board grants summary judgment to Ecology and WEC on
13 Issues 3, 4, 5, 6, 7, 9, and 10.

14 **1. SEPA**

15 With the enactment of SEPA in 1971, the legislature sought to bring an environmental
16 consciousness into government decision making. *Columbia Riverkeeper v. Port of Vancouver*
17 *USA*, 188 Wn.2d 80, 91, 392 P.3d 1025 (2017). The stated purposes of SEPA are

18 (1) To declare a state policy which will encourage productive and enjoyable
19 harmony between humankind and the environment; (2) to promote efforts which
20 will prevent or eliminate damage to the environment and biosphere; (3) and [to]
21 stimulate the health and welfare of human beings; and (4) to enrich the
understanding of the ecological systems and natural resources important to the
state and nation.

1 RCW 43.21C.010 (alteration in original). SEPA recognizes the broad policy “that each person
2 has a fundamental and inalienable right to a healthful environment.” RCW 43.21C.020(3). The
3 primary focus of SEPA is on the decision making process. SEPA seeks to ensure that
4 environmental values are given appropriate consideration. *Stempel v. Dep’t of Water Res.*, 82
5 Wn.2d 109, 118, 508 P.2d 166 (1973); *Moss v. City of Bellingham*, 109 Wn. App. 6, 14, 31 P.3d
6 703 (2001). SEPA imposes a duty on the government agency to assemble and review full
7 environmental information before rendering a decision. *Davidson Series & Assocs. v. City of*
8 *Kirkland*, 159 Wn. App. 616, 634-35, 246 P.3d 822 (2011).

9 SEPA requires an EIS only for “major actions having a probable significant, adverse
10 environmental impact.” *Boehm v. City of Vancouver*, 111 Wn. App. 711, 718, 47 P.3d 137
11 (2002); RCW 43.21C.031(1). “The primary function of an EIS is to identify adverse impacts to
12 enable the decisionmaker to ascertain whether they require either mitigation or denial of the
13 proposal.” *Victoria Tower P’ship v. City of Seattle*, 59 Wn. App. 592, 601, 800 P.2d 380 (1990);
14 WAC 197-11-400(2) (“An EIS shall provide impartial discussion of significant environmental
15 impacts and shall inform decision makers and the public of reasonable alternatives, including
16 mitigation, that would avoid or minimize adverse impacts or enhance environmental quality.”)
17 The purpose of an EIS is to provide decision makers with “sufficient information to make a
18 reasoned decision.” *Citizens Alliance To Protect Wetlands v. City of Auburn*, 126 Wn.2d 356,
19 362, 894 P.2d 1300 (1995).

1 Issuance of an EIS does not approve or deny a project. Rather, the EIS accompanies a
2 proposal through the agency review process so that agency officials can use the document when
3 making permitting decisions. RCW 43.21C.030(2)(d). “Any governmental action may be
4 conditioned or denied” based on the adverse environmental impacts disclosed in an EIS. RCW
5 43.21C.060; WAC 197-11-660; *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 64, 578 P.2d
6 1309, 1312 (1978)(“SEPA confers substantive authority to the deciding agency to act on the
7 basis of the impacts disclosed”). The granting or denial of a Section 401 water quality
8 certification is a governmental action within the meaning of RCW 43.21C.060. *See* WAC 197-
9 11-704(2) (“actions” defined to include the licensing of a project). Ecology is the state agency
10 authorized to issue or deny certifications under Section 401 of the CWA. RCW 90.48.260.

11 The policies and goals of SEPA are supplementary to “existing authorizations of all
12 branches of government.” RCW 43.21C.060. SEPA serves as an “overlay” on existing
13 authority, making formerly ministerial decisions discretionary. *Polygon*, 90 Wn.2d at 65. Using
14 SEPA substantive authority, a decision maker may deny a permit even if it meets all of the
15 requirements for approval under permit criteria. *Polygon*, 90 Wn.2d at 63-65; *West Main Assoc.*
16 *v. City of Bellevue*, 106 Wn.2d 47, 53, 720 P.2d 782 (1986) (“under [SEPA], a municipality has
17 the discretion to deny an application for a building permit because of adverse environmental
18 impacts even if the application meets all other requirements and conditions for issuance”).

19 The denial of a proposal must be predicated “upon policies identified by the appropriate
20 governmental authority and incorporated into regulations, plans, or codes which are formally
21

1 designated by the agency” or appropriate legislative body. RCW 43.21C.060; WAC 197-11-

2 660(1)(a). In order to deny a proposal under SEPA, a decision maker must find that

3 (1) The proposal would be likely to result in significant adverse environmental
4 impacts identified in a final or supplemental environmental impact statement
5 prepared under this chapter; and (2) reasonable mitigation measures are
6 insufficient to mitigate the identified impact.

7 RCW 43.21C.060; WAC 197-11-660(1)(f). “The decision maker shall cite the agency SEPA
8 policy that is the basis of any condition or denial under this chapter[.]” WAC 197-11-660(1)(b).

9 Failure to sufficiently document compliance with these requirements can result in reversal of a
10 SEPA-based denial.² *Cougar Mountain Assoc. v. King County*, 111 Wn.2d 742, 752-53, 765
11 P.2d 264 (1998).

12 **2. Millennium’s 401 Certification request not categorically exempt from SEPA**

13 Certain actions are statutorily or administratively exempt from SEPA’s threshold
14 determination and EIS requirements. Statutory exemptions are set forth in chapter 43.21C RCW.
15 As for administrative or categorical exemptions, the legislature directed Ecology to adopt rules
16 identifying categories of governmental actions “not to be considered as potential major actions
17 significantly affecting the quality of the environment.” RCW 43.21B.110(1)(a). Additionally,
18 “the rules shall provide for certain circumstances where actions which potentially are
19 categorically exempt require environmental review. An action that is categorically exempt under
20 the rules adopted by the department may not be conditioned or denied under this chapter.” *Id.*

21 ² Millennium does not claim that Ecology’s 401 Certification decision failed to comply with the requirements of
RCW 43.21C.060 or WAC 197-11-660(1).

1 Reviewing this provision, the court of appeals stated that its plain language directed Ecology “(1)
2 to develop its own list of government-action categories that are not major actions affecting the
3 quality of the environment (‘administratively-created’ categorical exemptions), and (2) to create
4 a rule-based exception that governs when a proposal potentially falling under an otherwise
5 exempt government-action category may nonetheless require environmental review.” *Alpine*
6 *Lakes Prot. Soc’y v. Dep’t of Ecology*, 135 Wn. App. 376, 391, 144 P.3d 385 (2006).

7 Carrying out the legislative directive, Ecology adopted a number of categorical
8 exemptions. *See* WAC 197-11-305, -800 to -890. The SEPA regulations define “categorical
9 exemption” as “the type of action, specified in these rules, which does not significantly affect the
10 environment [.]” WAC 197-11-720. One such categorical exemption is the granting or denial of
11 a Section 401 water quality certification. WAC 197-11-800(9). Addressing the directive to
12 create an exception to exemption, the SEPA rules provide in relevant part that a proposal is not
13 categorically exempt if “(b) [T]he proposal is a segment of a proposal that includes: (i) [a] series
14 of actions, physically or functionally related to each other, some of which are categorically
15 exempt and some of which are not[.]”³ WAC 197-11-305(1)(b)(i). Under the SEPA regulations,
16 “proposal” means “a proposed action. A proposal includes both actions and regulatory decisions
17 of agencies as well as any actions proposed by applicants.” WAC 197-11-784.

18
19
20 ³ Citing to WAC 197-11-305, the definition of “categorical exemption” states that the SEPA rules “provide for those
21 circumstances in which a specific action that would fit within a categorical exemption shall not be considered
categorically exempt [.]” WAC 197-11-720.

1 Millennium contends that its 401 Certification request is categorically exempt from
2 SEPA. As such, pursuant to RCW 43.21C.110(1)(a) Ecology could not use substantive SEPA
3 authority to deny the request. Millennium argues that by identifying a Section 401 water quality
4 certification as an action categorically exempt from SEPA, Ecology determined that such action
5 remains categorically exempt even if Millennium's proposal as a whole is subject to SEPA.
6 According to Millennium, Ecology is incorrect in claiming that WAC 197-11-305(1)(b)(i)
7 negates the categorical exemption status of its 401 Certification request. Millennium asserts that
8 its reading of WAC 197-11-305(1)(b)(i) is supported by the court of appeals decision in *Clallam*
9 *County Citizens for Safe Drinking Water v. City of Port Angeles*, 137 Wn. App. 214, 151 P.3d
10 1079 (2007).

11 Ecology and WEC argue that, under WAC 197-11-305(1)(b)(i), Millennium's 401
12 Certification request is not categorically exempt as it is part of a larger proposal where some
13 actions are categorically exempt and others are not. They assert that this conclusion is consistent
14 with Ecology's longstanding interpretation of its own regulation and, as such, it is entitled to
15 deference. *See* Randall Decl., Ex. A at ¶ 4. Ecology and WEC contend that, because
16 Millennium's 401 Certification request was not SEPA exempt, Ecology rightfully employed its
17 SEPA substantive authority to deny 401 Certification for the Project. Finally, Ecology asserts
18 that Millennium's reliance on *Clallam County Citizens* is misplaced as the court's reasoning in
19 that case was unique and did not establish any binding precedent on this issue.

20 The Board concludes that Millennium's request for a 401 Certification is not
21 categorically exempt from SEPA. The categorical exemption for Section 401 water quality

1 certifications does not apply to Millennium’s 401 Certification request as it is undisputedly a
2 segment of a proposal that includes “[a] series of actions, physically or functionally related to
3 each other, some of which are categorically exempt and some of which are not[.]” WAC 197-
4 11-305(1)(b)(i); *Foster v. King County*, 83 Wn. App. 339, 348, 921 P.2d 552 (1996) (SEPA
5 “categorical exemptions do not apply to actions that are a mixture of exempt and non-exempt
6 activities”).

7 This conclusion is consistent with Ecology’s longstanding interpretation of its SEPA
8 regulations. *See* Randall Decl., Ex. A at ¶ 4 (if project requires at least one SEPA non-exempt
9 permit, Ecology requires compliance with SEPA for 401 certification). Ecology’s interpretation
10 of its own regulation is entitled to great weight, unless such interpretation conflicts with the
11 statute’s plain language. *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568,
12 593-94, 90 P.3d 659 (2004). The Board concludes that Ecology’s interpretation does not conflict
13 with RCW 43.21C.110, which specifically directs Ecology to develop a rule addressing those
14 instances when an otherwise categorically exempt action would be subject to SEPA.

15 The Board disagrees with Millennium’s assertion that *Clallam County Citizens* supports
16 its position that WAC 197-11-305(1)(b)(i) does not apply. It is unclear precisely what proposal,
17 if any, the Court of Appeals considered in its analysis when it summarily concluded that WAC
18 197-11-305(1)(b)(i) did not apply because the underlying action was categorically exempt from
19 SEPA. *Id.* at 222. As a result, the decision in *Clallam County Citizens* lacks necessary clarity on
20 the status of a SEPA categorical exemption in the context of a larger proposal. The Board does
21

1 not consider *Clallam County Citizens* to be helpful to its resolution of the categorical exemption
2 issue raised in this case.

3 **3. CWA Section 401 does not preclude use of substantive SEPA**

4 Millennium asserts that the plain language of CWA Section 401(a)(1), 33 U.S.C. §
5 1341(a)(1), precludes Ecology’s use of substantive SEPA authority when reviewing a request for
6 a Section 401 water quality certification. According to Millennium, under Section 401(a)(1)
7 Ecology can only consider whether a discharge meets the applicable provisions of the CWA set
8 forth in that section, all of which relate to water quality. 33 U.S.C. § 1341(a)(1) (citing sections
9 1311, 1312, 1313, 1316, and 1317). In support of this assertion, Millennium relies on *Arnold*
10 *Irrigation District v. Department of Environmental Quality*, 79 Or. App. 136, 717 P.2d 1274
11 (1986), where the Oregon court reversed the state’s finding of non-compliance with land use
12 regulations as the basis for denying a Section 401 water quality certification.

13 Millennium further asserts that Section 401(a) preempts Ecology’s use of SEPA
14 substantive authority to deny the 401 Certification. Millennium states that its use of the word
15 “preempt” is intended to mean “to prevent from happening or taking place” and it is arguing that
16 Ecology’s denial was *ultra vires*, not that there is field or conflict preemption. Millennium
17 Reply at 8. Millennium contends that Ecology acts under federal law when deciding whether to
18 issue a Section 401 water quality certification and the agency “cannot use state law authority to
19 expand the scope of federal certification requirements under 33 U.S.C. § 1341(a).” Millennium
20 Mot. for S.J. at 13 (emphasis omitted). Millennium asserts that, by using substantive SEPA
21 authority, Ecology is improperly attempting to graft an additional criterion into Section

1 401(a)(1). Millennium argues that the 401 Certification denial must be set aside as Ecology did
2 not limit its denial to water quality effects of the discharge under the CWA sections identified in
3 Section 401(a)(1).

4 Rejected Millennium's reading of Section 401, Ecology argues that the text of the statute
5 does not prescribe what the agency may consider when denying a Section 401 water quality
6 certification. Ecology and WEC note that SEPA is supplementary to all other authorizations and
7 assert that, in order for it not to apply to Section 401, it must be preempted. Millennium did not
8 engage in a preemption analysis, choosing instead to simply cite the text of Section 401.

9 Ecology and WEC contend that the CWA does not preempt SEPA and Ecology can use
10 substantive SEPA to deny Millennium's 401 Certification request even if the Project meets all of
11 the standards in Section 401.

12 Ecology and WEC assert that Millennium's reliance on *Arnold* is misplaced as Oregon
13 does not have a statutory equivalent to SEPA. Ecology contends that, contrary to Millennium's
14 assertion, the state Supreme Court's citation of *Arnold* in *Dep't of Ecology v. PUD No. 1 of*
15 *Jefferson Cy.*, 121 Wn.2d 179, 849 P.2d 646 (1993) lends no support to its argument that Section
16 401 "supersedes" state law. Rather, the state Supreme Court cited *Arnold* only for the
17 proposition that Section 401(d) provides a state with broad authority to condition a project.

18 Ecology and WEC further contend that *Arnold* and other out-of-state cases cited by Millennium
19 are inapplicable as they dealt with hydroelectric projects subject to the jurisdiction of the Federal
20 Energy Regulatory Commission (FERC) and governed by the Federal Power Act. Unlike the
21 CWA, the Federal Power Act preempts state and local law. According to Ecology and WEC,

1 absent preemption of SEPA by the CWA, Ecology was not precluded from using its SEPA
2 substantive authority in denying Millennium’s 401 Certification request.

3 The Board concludes that the text of CWA Section 401 does not preclude Ecology’s use
4 of substantive SEPA authority when acting on a Section 401 water quality certification request.
5 As detailed above, SEPA’s policies and goals are supplementary to “existing authorizations of all
6 branches of government.” RCW 43.21C.060. SEPA serves as an “overlay” on existing
7 authority, making formerly ministerial decisions discretionary. *Polygon*, 90 Wn.2d at 65. A
8 decision maker can use SEPA substantive authority to deny a permit even if it meets all of the
9 requirements for approval under permit criteria. *Polygon*, 90 Wn.2d at 63-65; *West Main Assoc.*
10 *v. City of Bellevue*, 106 Wn.2d 47, 53, 720 P.2d 782 (1986). Pursuant to RCW 43.21C.060,
11 “[a]ny governmental action may be conditioned or denied” under SEPA. *See* WAC 197-11-660;
12 *Polygon*, 90 Wn.2d at 64. There is no dispute that the granting or denial of a Section 401 water
13 quality certification constitutes a governmental action within the meaning of RCW 43.21C.060.
14 *See* WAC 197-11-704(2). The Board concludes that Ecology lawfully employed its SEPA
15 substantive authority to deny Millennium’s 401 Certification request based on the significant
16 adverse environmental impacts identified in the FEIS.

17 The Board further concludes that court’s reasoning in *Arnold* does not apply to this case.
18 Unlike Washington, Oregon does not have a statute comparable to SEPA. In addition, *Arnold*
19 involved a FERC permit governed by the Federal Power Act, which preempts state and local
20 laws. *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 181-82 (1946) (Federal Power Act
21 establishes comprehensive federal scheme for regulating hydroelectric power projects on

1 navigable waters and thus preempts state law by occupying the field). Contrary to Millennium's
2 claim, the text of Section 401 does not support the conclusion that Ecology is precluded from
3 employing SEPA in the review of a Section 401 water quality certification request.

4 **4. Ecology's denial of 401 Certification not clearly erroneous**

5 Unless otherwise required by law, the Board's scope and standard of review shall be de
6 novo. WAC 371-08-485(1). SEPA does not prescribe the scope or standard of review on
7 appeal. Deferring to case law, the Board reviews the exercise of SEPA substantive authority to
8 condition or deny a proposal under the "clearly erroneous" standard of review. *Polygon Corp. v.*
9 *Seattle*, 90 Wn.2d 59, 69, 578 P.2d 1309 (1978); *see also McQuarrie v. Seattle*, SHB No. 08-033
10 (Findings of Fact, Conclusions of Law, and Order, Aug. 5, 2009) ("review of an agency's
11 exercise of substantive SEPA authority (i.e. the content of agency action, such as mitigation or
12 conditions) is also under the clearly erroneous standard"). Under this standard, the Board "does
13 not substitute its judgment for that of the administrative body and may find the decision clearly
14 erroneous only when it is left with the definite and firm conviction that a mistake has been
15 committed." *Polygon*, 90 Wn.2d at 69 (*quoting Ancheta v. Daly*, 77 Wn.2d 255, 259-60, 461
16 P.2d 531 (1969)) (internal quotations omitted).

17 There are no material issues of fact in dispute that preclude the granting of summary
18 judgment. In this case, Ecology relied on the unchallenged FEIS in exercising its SEPA
19 substantive authority to deny the 401 Certification. Millennium does not dispute the factual
20 findings in the FEIS. The Board will not substitute its judgment for that of Ecology when
21 reviewing under a clearly erroneous standard of review. Based on the Board's review of the

1 FEIS, and the FEIS's conclusion that the Project will have unavoidable and significant adverse
2 impacts, the Board is not left with the definite and firm conviction that Ecology made a mistake
3 when it denied Millennium's request for a 401 Certification under the agency's substantive
4 SEPA authority. The Board grants summary judgment to Ecology and WEC on Issues 3, 4, 5, 6,
5 7, 9 and 10 and dismisses Millennium's appeal.

6 **C. Remaining Issues (Issues 2, 8, 11, and 12)**

7 The remaining issues ask whether there was reasonable assurance that the Project would
8 meet water quality standards, whether Ecology waived its certification rights under Section 401,⁴
9 whether Ecology had authority to deny the 401 Certification with prejudice, and whether
10 Millennium was barred from challenging the FEIS. Because the Board concludes that the 401
11 Certification is not exempt from SEPA and Section 401 of the CWA does not preclude
12 Ecology's use of substantive SEPA to deny a certification request, it need not reach Issues 2, 8,
13 11, and 12.

17 ⁴ Section 401(a)(1) of the CWA provides that if a state certifying agency "fails or refuses to act on a request for
18 certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request," the
19 state agency waives its right to issue a certification. 33 U.S.C. § 1341(a)(1). Millennium asserted that, although
20 Ecology acted on the certification request within the one year time period, Ecology's actions in denying certification
21 were "tantamount to a refusal or failure to act in the manner contemplated by section 401, and the Board should
declare and adjudge that Ecology has waived its opportunity to certify the project." Millennium Mot. for S.J. at 22.
While the Board need not reach the issue, it does note that Section 401 by its unambiguous terms limits the finding
of waiver to a determination of whether the certifying agency acted within the prescribed time period. There is no
dispute that Ecology acted within one year of receiving Millennium's 401 Certification request. No legal basis
exists for the Board to take the action advanced by Millennium.

1 **ORDER**

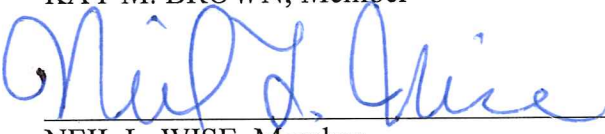
2 The Board GRANTS summary judgment to Washington Environmental Council, Climate
3 Solutions, Friends of the Columbia Gorge, Sierra Club and Columbia Riverkeeper, and the State
4 of Washington, Department of Ecology on Issues 3, 4, 5, 6, 7, 9 and 10 and AFFIRMS the
5 Department of Ecology's denial of the Clean Water Act Section 401 Certification requested by
6 Millennium Bulk Terminals-Longview, LLC.

7 SO ORDERED this 15th day of August, 2018.

8
9 **POLLUTION CONTROL HEARINGS BOARD**

10 
11 _____
12 JOAN M. MARCHIORO, Presiding

13 
14 _____
15 KAY M. BROWN, Member

16 
17 _____
18 NEIL L. WISE, Member
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20
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